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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 662

AMERICAN TRUCKING ASSOCIATIONS, INC. AND NATIONAL TANK TRUCK CARRIERS, INC., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

The Commission, on its own motion, commenced an investigation of accidents at rail-highway grade crossings involving railway trains and motor vehicles transporting certain dangerous commodities. The purpose of the investigation was to determine what safety re-

quirements could or should be imposed, within the existing authority of the Commission, and what additional legislation might be necessary, and to focus public attention on the gravity of the problem. The investigation was later broadened to include all grade-crossing accidents involving trains and motor vehicles. After lengthy investigative proceedings, the Commission issued a report (J.S. App. D), in which, among other things, it discussed in detail the evidence regarding the causes of grade-crossing accidents (J.S. App. D, 13–21, 24–45); noted that a major problem was the inadequacy of enforcement of existing federal and State safety regulations (J.S. App. D 87); and adopted a number of specific recommendations aimed at improving grade-crossing safety (J.S. App. D, 88–90), including recommendations for additional federal and State legislation. But the Commission also concluded in its report that under existing law the Commission had no general jurisdiction over railroads with respect to rail-highway grade-crossing safety, and that such matters as the installation and maintenance of signals and other devices for the protection of vehicular traffic at grade crossings were not within the scope of the Commission's existing safety jurisdiction (J.S. App. D 48). The Commission accordingly ordered the proceeding discontinued.

Appellants, associations of motor common carriers which had participated in the investigative proceedings, brought this action in a three-judge federal district court to set aside the Commission's report and order disclaiming jurisdiction. The court dismissed their complaint, holding that neither of the statutes

relied on by appellants "vests the Commission with any safety jurisdiction over railroads with respect to rail-highway grade crossings" (J.S. 30). The court further noted "the plaintiffs' inability to show any legal damage resulting from the action of the Interstate Commerce Commission," and stated that the "Court believes that the plaintiffs lack status to maintain this action, and if the Court were required to pass upon this question, it would so hold" (*ibid.*).

ARGUMENT

The decision below is plainly correct. Plenary consideration is not warranted.

1. Appellants read (J.S. 8–12) the decision below as premised on the view that grade-crossing safety is a matter exclusively for the police power of the States and argue (J.S. 10–12) that it is, rather, an area of concurrent jurisdiction. But no one disputes that Congress *could,* in the exercise of its power over interstate commerce, give the Interstate Commerce Commission authority over such matters. The thrust of the decisions below is simply that Congress has not done so. That conclusion is clearly correct. The consistent practice of Congress with respect to railroad safety regulation under Part I of the Interstate Commerce Act and related statutes has been to grant the Commission only limited jurisdiction in specific areas.[1] For example, the Boiler Inspection Acts, 45 U.S.C. 22–34, empowers the Commission to require that

[1] This is in sharp contrast to Part II of the Act, where Section 204(a), 49 U.S.C. 304(a), grants the Commission broad authority over the "safety of operation and equipment" of motor carriers.

locomotives, boilers, tenders, and all parts and appurtenances be kept in safe condition, and the Safety Appliance Act, 49 U.S.C. 26, authorizes the Commission to require the railroads to install certain safety appliances and systems. But the Commission has no general power over the safety of railroad operations; and nowhere has Congress given the Commission specific authority to impose safety regulations on railroads with respect to grade crossings.

Appellants point (J.S. 13–15) to Section 1(21) of the Interstate Commerce Act, which authorizes the Commission to order a railroad to "provide itself with safe and adequate facilities for performing as a common carrier its car service." The term "car service" is defined by Section 1(10) of the Act to include "the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains." The legislative history reveals that the sole purpose of Section 1(21) was to empower the Commission to cope with the problem of shortages of freight cars. The statute had its genesis in the Commission's 30th Annual Report, issued in 1916, in which the Commission noted the recurrent problem of an insufficient supply of freight cars for the movement of such commodities as coal and grain, and expressed doubt whether it had statutory authority to promulgate car-service rules (pp. 67–74, 91–92). Congress' response was the enactment in 1917 of the Esch Car Service Act, 40 Stat. 101. The Committee reports (H.

Rep. 18, 65th Cong., 1st Sess.; S. Rep. 43, 65th Cong., 1st Sess.) make clear that the problem of freight-car shortages and the need for the promulgation of orders and regulations by the Commission to alleviate that problem were the only concerns of the legislators. Subsequent amendments to the Act, and its eventual incorporation into Section 1 of the Interstate Commerce Act, did not broaden its purpose or change its essential meaning. And although this provision has been in effect for almost fifty years, it has never been construed by the Commission or the courts as granting the Commission any general safety jurisdiction over railroads.[2] The Commission's view of the scope of the provision, moreover, is consistent with this Court's conclusion in *Peoria Ry.* v. *United States,* 263 U.S. 528, 533–534, that the term "car service" is used in a "limited sense," and "connotes the use to which the vehicles of transportation are put; not the transportation service rendered by means of them."

Neither is jurisdiction over grade-crossing safety conferred by Section 26 of the Act, which provides in pertinent part that the "Commission may * * * order any carrier * * * to install the block signal system, interlocking, automatic train stop, train con-

[2] It is significant that the orders issued by the Commission under the car-service provisions have been limited to attempting to assure shippers an adequate supply of freight cars. The Commission has not attempted to regulate the operation of freight trains for broader purposes, and has even held that these provisions do not vest in it any authority over passenger trains. *Wisconsin Railroad Comm'n* v. *Chicago & N.W. Ry. Co.*, 87 I.C.C. 195.

trol, and/or cab-signal devices, and/or other similar appliances, methods, and systems intended to promote the safety of railroad operation." The specifically-named systems and devices are exclusively intended for the prevention of derailments and the avoidance of collisions between trains moving on the same block of track. See *Automatic Train Control Devices,* 69 I.C.C. 258. Highway grade-crossing safety systems and devices represent a completely different class of systems and devices, and the legislative history of Section 26 is explicit that Congress, in including the phrase "other similar appliances, methods, and systems," did not intend to authorize Commission regulation of grade-crossing safety.

As originally enacted, Section 26 authorized the Commission to require railroads to adopt "automatic train-stop or train-control devices or similar safety devices" (41 Stat. 498). Because the Commission's authority was thought to be limited to train-stop or train-control devices,[3] Congress in 1937 clarified and broadened the scope of the Commission's authority under Section 26 to embrace the specified additional devices and systems. As originally worded, the bill approved by Congress for this purpose, S. 29, authorized the Commission to require the installation of "highway grade-crossing protection devices." 81 Cong. Rec. 4642–4643. S. 29 was referred to the Commission for comments, and in a letter by Joseph B. Eastman, Chairman, Legislative Committee, the

[3] See Hearing on H.R. 185 Before the House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., p. 12.

Commission recommended that the language "highway grade-crossing protective devices" be deleted on the grounds, *inter alia*, that "devices of this character are installed primarily to safeguard highway traffic" and that administration of such matters "can be far more effectively performed by local authorities."[4] Accordingly, when S. 29 was reported out by the Committee, the language "highway, grade-crossing protective devices" was stricken wherever it appeared in the measure. (See S. Rep. 245, 75th Cong., 1st Sess.)

Further, the Senate in 1953 approved a bill authorizing the Commission to require railroads to install electronic safety devices such as "telegraph, telephone, radio, inductive, or other wayside and/or train-communication systems * * * to promote safety of railroad operation." S. 539.[5] The Committee's favorable report on this bill stated that adoption was necessary because the Commission's jurisdiction under Section 26 was not broad enough to cover such electronic safety devices. (S. Rep. 572, 83d Cong., 1st Sess., p. 2.) Thus Section 26, now urged by appellants as broad enough to authorize regulation by the Commission of grade-crossing safety, was considered

[4] Mr. Eastman's letter is reproduced in full at pp. 3–6 of the Hearings on H.R. 185 Before the House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess. (H.R. 185 was identical to S. 29.) The language "highway grade crossing protective devices" was stricken from H.R. 185 on the recommendation of the Commission (Hearing, p. 15).

[5] The bill is set forth in Hearings on S. 539 Before the Senate Committee on Interstate and Foreign Commerce, 83d Cong., 1st Sess., p. 1.

by the Senate as not even authorizing electronic communication devices to ensure safe operations of railroads.[6]

Finally, appellants seek to find statutory authority in Section 12(1) of the Act, which authorizes the Commission to "execute and enforce the provisions of [Part I]," and in the National Transportation Policy, 54 Stat. 899, which directs that all provisions of the Act be so administered as to "promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation." Such provisions, however, are directives to the Commission in the exercise of its substantive powers under other sections of the Act; they confer no additional powers.[7]

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[6] In addition, the Senate, a few months after it approved the 1937 amendments to Section 26, approved a bill establishing a commission to deal with the problem of grade-crossing safety (S. 18, 75th Cong., 1st Sess.). The purpose of this commission was to investigate "systems, devices, appliances, and methods * * * for the protection of the public and the promotion of safety in the operation of railroads * * * and in the use of the public highways." (Hearing on S. 18 Before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess). Although the bill did not reach the floor of the House of Representatives, the fact that the Senate felt that this legislation was necessary rebuts appellants' assertion that Congress intended to authorize Commission regulation of grade-crossing safety by Section 26.

[7] The Commission's conclusion that it lacked jurisdiction to impose safety regulations on railroads with respect to grade crossings does not, of course, leave the safety of grade crossings without governmental regulation. This Court has made clear that State regulation of the safety of grade crossings is constitutionally permissible even though the result of such regulation may be to affect interstate commerce. See, *e.g.*, *Lehigh Valley R.R. Co.* v. *Board of Public Utility Commissioners*, 278 U.S. 24.

2. The district court correctly indicated (J.S. 30) an alternative basis for dismissing appellants' action: that they lacked standing to bring it. Persons who seek to challenge the Commission's rulings must show that they, or those they represent, have suffered a direct adverse effect as a result of the Commission's action. *Moffat Tunnel League* v. *United States,* 289 U.S. 113, 119; *Alexander Sprunt & Son* v. *United States,* 281 U.S. 249, 255; *Pittsburgh & W. Va. Ry. Co.* v. *United States,* 281 U.S. 479, 486; see Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 1009(a). No such showing has been made.

Appellants, associations of *motor carriers,* here seek to challenge the Commission's determination of the scope of its jurisdiction to impose safety regulations upon *railroads.* Undoubtedly, the motor carriers are concerned that the Commission's view that it lacks authority to impose grade-crossing safety requirements on railroads may lead the Commission to impose more stringent requirements on motor carriers, over which its authority appears to be much broader (see n. 1, *supra,* p. 3). But the Commission has not yet done so; nor is it certain that it ever will. To be sure, in the report here at issue the Commission directed the institution of rule-making proceedings with respect to grade-crossing safety measures required of motor carriers (J.S. App. D 90). But those proceedings have now been concluded, and the Commission has decided not to impose significant new safety requirements upon the motor carriers. *Qualifi-*

cations of Employees and Safety of Operations, 98 M.C.C. 741.

If and when any such requirements are imposed, there will be time enough for the motor carriers to challenge their legality, arguing that such requirements are premised in part on an erroneous view of the Commission's authority to regulate railroads in this area. At the present time, however, appellants have not been directly affected or aggrieved by the Commission's ruling on its safety jurisdiction.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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AMERICAN TRUCKING ASSOCIATIONS, INC., AND NATIONAL TANK TRUCK CARRIERS, INC.,
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v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal From the United States District Court for the District of Columbia

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REPLY TO MOTIONS TO AFFIRM

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REPLY TO MOTIONS TO AFFIRM

The Government Appellees suggest in their motion to affirm (pp. 9-10) and the Intervening Appellee railroads argue in theirs (pp. 8-12) that the judgment of the District Court should be affirmed because Appellants allegedly have not shown any legal damage resulting from the action of the Interstate Commerce Commission.[1]

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[1] Although both the Government and Intervening Appellees speak of Appellants' "standing," the term used by the District Court was

The District Court indicated how it would rule "if the Court were required to pass upon this question" (J.S. p. 30), but it admittedly did not pass upon it.

The Government acknowledges the motor carriers' concern that the conclusions on grade-crossing safety jurisdiction "may lead the Commission to impose more stringent requirements on motor carriers." (p. 9) It also concedes that one such rule-making proceeding has been undertaken by the Commission as a result of the agency decision here in issue. (*Ibid.*) It argues that, inasmuch as the Commission decided in the rulemaking case "not to impose significant new safety requirements upon the motor carriers," no legal injury has been sustained. (pp. 9-10)[2] The Government does not contend that the Appellants cannot challenge the conclusion on the Commission's authority over railroad grade-crossing safety, rather it says that this is the wrong time and the wrong case:

> "If and when any such requirements are imposed, there will be time enough for the motor carriers to challenge their legality, *arguing that such requirements are premised in part on an erroneous view of the Commission's authority to regulate railroads in this area.*" (p. 10 Emphasis added)

Significantly, the Government offers no assurance that in such future proceedings, the motor carriers will be permitted collaterally to attack the instant decision. The procedure suggested by the Government is not only unnecessarily cumbersome, but in practice it will work to deny the courts the opportunity to review the Commission's legal conclusions on its jurisdiction. In its brief to the District Court, the Government argued that rule-making

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"status," and it was obviously referring to the question of showing "legal damage." (J.S. p. 30)

[2] As to the completeness of this Government statement, see below, pp. 5-6.

proceedings which arise out of the Commission's findings and conclusions in the instant investigation proceeding do not threaten the motor carriers with a legal wrong because any revised rules "would be merely incidental to [the motor carriers] being subject to the scheme of regulation which Congress has established in the public interest." (p. 28) In spite of the Government's suggestion of such a course, we simply do not believe that either the Commission or the courts will permit, in a separate and *subsequent* motor carrier rule-making proceeding, an attack on the Commission's conclusion in *this* case on its jurisdiction over railroad safety. If the Commission's conclusion on its jurisdiction over railroad grade-crossing safety is not reviewable in a direct appeal of the proceeding in which that conclusion is reached, a procedure will be established which will bar the courts from exercising supervision over agency action in this and similar areas. The agency can conduct an investigation, as it did here, in which it gathers all of the facts and passes upon all of the legal questions but issues no order specifically directing any party to do or refrain from doing anything. It can then at any time conduct a separate rule-making proceeding in which it can issue rules which are framed by the evidence found and the legal conclusions reached in the investigation.[3] By claiming that the proceedings are unrelated and must stand each on its own separate base, the agency will be able to deny the courts' right of review.

Intervening Appellees' reliance on *United States* v. *Los Angeles & Salt Lake R. R.*, 273 U. S. 299 (1927), is not

[3] The order instituting the rule-making proceeding in Ex Parte Docket No. MC-40, *Qualifications of Employees and Safety of Operations*, 98 M.C.C. 741 (1965), stated that it appeared reasonable and necessary "to establish stopping requirements of a more encompassing and strict nature as stated in" the Commission's decision here under attack. Of course, future rule-making proceedings need not be expressly related to the investigation proceeding to utilize its findings and conclusions.

well placed. In *Frozen Food Express* v. *United States*, 351 U.S. 40, 43-44 (1956), this Court distinguished the *Los Angeles* case on the ground that the agency order there was "merely the formal record of conclusions reached after a study of data collected in the course of an extensive research conducted by the Commission, through its employees," while the order in *Frozen Food Express* had an immediate and practical impact on the carriers involved and shippers as well. The finding in favor of reviewability in *Frozen Food Express* was made even though the consequences to the complaining motor carrier —criminal penalties, cease and desist orders and enforcement of such orders, and revocation of operating rights— were potential dangers only as a result of the order therein. The Court summarized the nature of the "order" there involved:

> "The 'order' of the Commission is in substance a 'declaratory' one, . . . which touches vital interests of carriers and shippers alike and sets the standard for shaping the manner in which an important segment of the trucking business will be done. Cf. Columbia Broadcasting System v. United States, 316 U.S. 407, 62 S. Ct. 1194, 86 L. Ed. 1563. The consequences we here summarize are not conjectural." (351 U.S. at 44)

The report and order in the instant case has an even more immediate impact on the motor carriers since it found the necessity for additional and more stringent regulations on the motor carriers.[4] Even though it found that the regulated motor carriers generally present no problem with respect to grade-crossing safety (J.S. App. D 71), *on the basis of the decision here in issue*, the Commission has already imposed regulation "of a more encompassing and strict nature" on them. And because of

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[4] J.S. App. D 88. And see n. 3 *supra* for statement in the Commission's rule-making order.

its conclusion that it lacks jurisdiction over railroads, further or more burdensome regulation of the motor carriers is the only avenue the Commission has left itself to deal with grade-crossing safety. The Commission's decision here is not abstract, theoretical, or academic, but touches vital interests of the motor carriers. (351 U.S. at 44)

One of the most recent decisions on the question of reviewability of agency decisions is *National Van Lines, Inc.* v. *United States*, 326 F. 2d 362 (7th Cir. 1964), involving an Interstate Commerce Commission determination that certain motor carriers of household goods had failed to apply the applicable tariff rates on certain shipments. Even though the Commission did not (and could not) order the carriers to make repayment of the difference in charges, the Court concluded that the decision was reviewable.[5]

The threat to the carriers in both *Frozen Food Express* and *National Van Lines* was prospective in that further action, not then under way, was necessary before the obligations or penalties would accrue. In the instant proceeding that further action has already occurred. The rule-making proceeding called for in the Commission decision has been completed and a more stringent regulation applicable to the motor carriers has been promulgated. The Government's statement (p. 9) that the Commission in the rule-making proceeding "decided not to impose significant *new* safety requirements upon the motor carriers" is incomplete. The Commission did change the test for cargo tank motor vehicles required to stop at grade crossings

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[5] Other cases upholding review of administrative orders include *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125 (1939); *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942); *El Dorado Oil Works* v. *United States*, 328 U.S. 12 (1946); *LaCrosse Tel. Corp.* v. *Wisc. Empl. Rel. Bd.*, 336 U.S. 18 (1949); *United States* v. *I.C.C.*, 337 U.S. 426 (1949); *Joint Anti-Fascist Refugee Committee* v. *United States*, 341 U.S. 123 (1951).